

[*Ashcraft v. University of Cincinnati*](#), 83-ERA-7 (ALJ July 1, 1983)

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U.S. Department of Labor
Office of Administrative Law Judges
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Cincinnati, Ohio 45202
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Date Issued: July 1, 1983
Case No. 83-ERA-7

In the Matter of

IRVIN LEE ASHCRAFT
Complainant

v.

UNIVERSITY OF CINCINNATI
Respondent

Appearances:¹

D. David Altman, Esq.
For the Complainant

Thomas Conlan, Esq.
For the Respondent

Before: Daniel J. Roketenetz
Administrative Law Judge

DECISION AND ORDER
Statement of the Case:

The proceeding arises under the Energy Reorganization Act of 1974, as amended (42 USC § 5851, *et seq.*), hereinafter

called the Act. This legislation prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. The Act is implemented by regulations designed to protect so-called "whistleblower" employees from retaliatory or discriminatory actions by their employers. (29 CFR Part 24) An employee who believes that he or she has been discriminated against in violation of the Act may file a complaint within 30 days of the occurrence of the alleged violation.

The Complainant in this case, Irvin Lee Ashcraft, filed a Complaint alleging discrimination on April 11, 1983. (Admin. Ex. 1)² The Complainant alleges, in essence, that he was given a five day suspension because he filed a complaint against the Respondent University of Cincinnati (UC) with the NRC and that he caused an investigation of UC's alleged improper handling of radioactive materials. Pursuant to the implementing regulations, the complaint was referred to the United States Department of Labor, Wage and Hour Division, which, following an investigation of the Complainant's allegations, found that the Complainant was suspended for reasons proscribed by the Act. (Admin. Ex. 2) In its letter of findings, the Wage and Hour Division ordered the Respondent to pay the Complainant a week's pay of \$324.80, to clear Complainant's file of the reprimand and suspension and to pay attorney fees and expenses incurred by Complainant in filing the claim of discrimination. Thereafter, the Respondent filed a timely request for a hearing before the Office of Administrative Law Judges. (Admin. Ex. 3)

In its Answer to the Complaint (Admin. Ex. 10), the Respondent denies, in substance, that it engaged in any discriminatory actions prohibited by the Act. Respondent raises as an affirmative defense that the Complainant was suspended for legitimate, non-pretextual reasons of incompetency and inefficiency.

Pursuant to Notice, a *de novo* hearing was held before the undersigned on June 1, 2 and 3, 1983, at Cincinnati, Ohio. The parties were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Post-hearing briefs were not permitted, but both parties, through counsel, made closing arguments at the hearing. In

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addition, the parties submitted pre-hearing memoranda to the undersigned.

Based upon the entire record, including my observation of the witnesses who testified and their demeanor, the testimony and evidence presented at the hearing and the arguments of the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Findings:

The Respondent admits, the record discloses, and I find that the Complaint was timely filed; UC is an "employer" within the meaning of the Act and regulations; Complainant is an "employee" within the meaning of the Act and regulations; and the Office of Administrative Law Judges properly has Jurisdiction over the subject matter of the Complaint.

Issues Presented:

An examination of the Complaint and the Answer thereto reveals that the sole issue to be decided in this case is whether the Complainant was given a five day suspension by the Respondent in retaliation for his having made allegations to the NRC of unsafe handling of radioactive materials by UC.

Background:

Respondent is a State of Ohio institution engaged in the operation of a university and several hospitals in Cincinnati. The Complainant is employed as a radiation health technician in the Radiation Safety Office, which is operated under the aegis of the University Medical Center. The Complainant, who has been employed in this position since December 1977, is responsible for all incoming shipments of radioactive materials into the university complex. His duties require him to take samples ("wipe test") from packages to insure noncontamination and then to notify the end users that the materials are available and safe for using in their experiments. The laboratory where Complainant is employed serves as a general clearing house for these radioactive materials, which are used throughout the university complex, both on

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campus and in the various hospitals.

The facts presented in the light most favorable to the Complainant disclose that commencing in 1981 and continuing up until the time of his suspension, the Complainant had written several letters to the NRC and others concerning alleged breaches of safety with respect to the use of radioactive substances. In late December 1982, the Complainant learned that the NRC was going to do an inspection of the Radiation Safety Office. However, contrary to the allegations of the Complainant, this NRC visit was initiated by Complainant's immediate supervisor for reasons not related to Complainant's safety allegations. On December 30, 1982, he wrote a letter to the NRC Outlining several instances he considered to be safety violations.

In January 1983, Complainant appeared on a local television station and publicly raised some questions regarding the potential detrimental effects of radiation by the Respondent's practices. In mid-January, NRC officials visited Complainant's work area, and he apparently spent several hours during working hours with them. Subsequently, on January 18, 1983, Eugene L. Saenger, M. D., Chairman of the Radiation Safety

Committee, submitted a memorandum to Billie Willits, Director of Employee Relations, recommending that the Complainant's employment be immediately terminated. (Compl. Ex. 30) On February 10, 1983, Complainant wrote a letter to the NRC advising them of "another item from the tip of the iceberg" and alleging, among other things, that there were rumors that anyone who spoke with NRC officials would be "in trouble". (Compl. Ex. 10) On February 18, 1983, William C. Lodge, Associate Director of Labor Relations (subordinate to Ms. Willits), gave Complainant a notice of a disciplinary hearing based on charges of "inefficiency/incompetency". (Compl. Ex. 5) The hearing was held on February 24, 1983. Complainant was found guilty of the charges, and a 5 day suspension order issued (Compl. Exs. 1 and 1A), effective February 28, 1983. Complainant also asserts that, as a consequence of his concern for safety, his employee performance evaluations have been successively downgraded.

Although not pertinent to a determination of the issue presented in this case, the Complainant has continued to correspond with the NRC and has again met with NRC officials since his suspension. There was some evidence adduced that

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during the post-suspension investigations of Respondent by the NRC, some potential problem areas had been identified, due at least in part to the Complainant's input. As of the time of the hearing, however, no formal findings had been made by the NRC, and UC was in the process of responding to the NRC relative to the problems identified.

The Alleged Discrimination Against the Complainant:

The record reflects that the Complainant's first two years of employment were apparently uneventful. Complainant testified that commencing in 1980 he began to observe some "common sense" safety violations in the handling and use of radioactive materials. These infractions did not necessarily involve the immediate area of Complainant's employment, but seemed to be more related to observed incidents by so-called end users.

Contrary to the Complainant's testimony, the documentary evidence of record reflects that he did not make any allegations regarding safety until 1981. He did, however, initiate a series of correspondence in 1980, the earliest item, although not in evidence, being alluded to in an April 15 memorandum to Jerome F. Wiot, M.D., Director of Radiology, from E. L. Saenger, M.D. (Resp. Ex. 1) From that memorandum, it appears that sometime in early April or late March the Complainant went to Dr. Wiot expressing his dissatisfaction with his work. Dr. Saenger, at Dr. Wiot's request, met with Complainant on April 4. Complainant, according to Dr. Saenger's memorandum, stated that the work he was doing was not as originally represented to him and that he was not being given opportunities in line with his educational background. Dr. Saenger again met with Complainant on April 21, 1980, wherein he again voiced his unhappiness with his work situation. (Resp. Ex. 2)

On May 2, 1980, Complainant wrote to the Auditor of the state of Ohio (Resp. Ex. 7), stating, in essence, that the Radiation Safety office needed to be looked at as a "cost item that might not be producing anything". He again stated that he was not being effectively utilized, given his educational background. He further alleged that other than himself, no one else in the Radiation Safety Office put in an "8-hour day".³ He contended that his supervisor, Kenneth Fritz,

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spent a good part of his day selling flea market items to other employees. This letter stressed that Complainant wanted his concerns addressed and that, if they were not, he would write to Governor Rhodes.

Sometime in May 1980 (exact date unknown), Complainant wrote to Dr. Stanley B. Troup, Senior Vice President of the university, stating that his job in the Radiation Safety Office could be accomplished by a clerk and alleged that Supervisor Fritz was incompetent. (Reap. Ex. 3) Complainant suggested that there were better ways that his talents could be utilized and that the Radiation Safety Office had to be looked at "long and hard in terms of what it produces versus the money spent". Memoranda dated May 9, 1980, and May 21, 1980, (Resp. Exs. 5, 4, respectively) reflect the involvement of Henry R. Winkler, University President, and William Lodge, Medical Center Personnel, in the Complainant's quest for a more fulfilling work situation.

On November 4, 1980, Complainant wrote a second letter to the Auditor of State (Resp. Ex. 11) complaining that there had been no investigation of the work practices of the Radiation Safety Office. He also stated that while Kenneth Fritz had ceased selling merchandise, there were "three employees scrambling for things to do and yet they were advertising for another employee". (See memoranda at Resp. Exs. 13, 12) Complainant suggested that if something was not done, he would take his complaints to the State legislature. The evidence does not reflect if the Complainant ever received a response to this communication.

On April 16, 1981, Complainant wrote to Michael Brookshire, Executive Director of Personnel at UC, restating his complaint that he was overqualified for the job he was doing. (Resp. Ex. 22) In that letter, he labeled Kenneth Fritz as the "clown of the Medical Center", reiterated Mr. Fritz's sales activities (although he noted that they had ceased a year earlier) and questioned why he was not being considered for other positions for which he had applied within the University. Mr. Brookshire did respond with a brief letter to the Complainant dated April 22, 1981. (Reap. Ex. 21)

None of the correspondence generated up through April 1981 made any mention of alleged safety malpractices of the Radiation Safety Office or the University. What the correspondence

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did chronicle was an individual who was obviously extremely dissatisfied in his job circumstances with the apparent expectation that someone, other than himself, should be doing something to remedy the situation. At the time of the hearing in the instant case, the Complainant testified that he was still performing the same duties that he had always done.

The first indication on this record of any activities by Complainant with the NRC is shown by a letter dated May 12, 1981. (Compl. Ex. 28) In that correspondence, the extent of past NRC investigations was questioned and it was suggested that Mr. Fritz, on one occasion, tried to sell the NRC representative some merchandise. Complainant also stated that his supervisor (Fritz) was incompetent and the Chairman of the Radiation Safety Committee (Saenger) had conflicts of interest. The suggestions made to the NRC by the Complainant in his letter were that UC's license be withdrawn until "satisfactory demonstration of common sense approach [to safety] - *willing* compliance"; replacement of the Radiation Safety Officer (Fritz); and a new chairman without conflicts of interest. While Complainant requested anonymity, Mr. Donald Steniawski of the NRC testified that this letter was made known to Respondent.

Apparently in response to the Complainant's allegations regarding safety, an internal memorandum was sent by Eugene Jacobson, M.D., Associate Dean, to Stanley Troup, M.D., Senior Vice President to the University and Director of the Medical Center, on May 12, 1981. (Compl. Ex. 38) Complainant's allegations were characterized as false, and it was recommended that he should be terminated because of "vicious and counter-productive behavior". However, Dr. Jacobson did suggest that an independent expert be called in to perform an investigation of the Complainant's allegations with the understanding that a favorable report to the Respondent would result in termination of the Complainant. Thereafter, on July 14, 1981, Dr. Winkler wrote to Dr. Troup that he should be "prepared to act on the Radiation Safety situation if there are any problems and in consultation with University Personnel to dismiss or otherwise reprimand Lee Ashcraft for his counterproductive behavior if in fact that is the case". (Compl. Ex. 24)

The above recitation of correspondence by the Complainant and the memoranda of various agents of the Respondent sets

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the stage for the events that followed. An adversarial relationship had been established between the Complainant and his immediate supervisor up to the highest levels of management at the University. Indeed, the Complainant initiated a plethora of letters to UC Officials and the NRC:

August 7, 1981 (Resp. Ex. 15) to K. M. Fritz
August 12, 1981 (Compl. Ex. 13) to the NRC

August 29, 1981 (Resp. Ex. 16) to William C. Lodge
September 9, 1982 (Resp. Ex. 17) to William C. Lodge
September 30, 1981 (Compl. Ex. 20) to Dr. Thomas Helmrath, State University
Board of Regents
October 8, 1981 (Resp. Ex. 20) to Dr. Winkler
November 2, 1981 (Compl. Ex. 22) to Dr. Saenger
February 11, 1982 (Compl. Ex. 15) to Dr. Saenger
May 5, 1982 (Resp. Ex. 45) to "whom it may concern", apparently directed to the
Radiation Safety Committee
June 11, 1982 (Resp. Ex. 47) to the Radiation Safety Committee
December 30, 1982 (Compl. Ex. 9) to the NRC
February 10, 1983 (Compl. Ex. 10) to the NRC

The thrust of the above correspondence initiated can be condensed into a repetition of the same complaints, *i.e.*, that Mr. Fritz was incompetent, that Dr. Saenger had conflicts of interest, that there were "common sense" violations of safety in the handling of radioactive materials and that the Radiation Safety Office was mismanaged. In turn, the Complainant's correspondence generated a large volume of internal memoranda and some responses to the Complainant. The tenor of the internal memoranda can be generally characterized as evidencing a desire to terminate the employment of the Complainant.

In January 1980, the Complainant was given a performance evaluation by his supervisor, which rated him as "high satisfactory" overall. In the individual categories, the Complainant was rated as satisfactory in all but "Initiative", where he was rated as "Needs Improvement". (Compl. Ex. 7) The Complainant's January 1981 evaluation was belatedly prepared on September 2, 1981. (Compl. Ex. 8) This evaluation followed his initiation of safety complaints. The report, which

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Complainant refused to sign, showed his overall rating as "Low Satisfactory" with a "Superior" rating in "Knowledge", and satisfactory ratings in all other categories except for "Attitude", "Relationship with People" and "Judgment", where he was rated as "Needs improvement". Finally, the Complainant was rated in January 1982. (Compl. Ex. 6) His overall rating had slipped to "Needs improvement". In the individual rating categories, he was rated as needing improvement in "Work Habits", "Dependability", "Attitude", "Initiative" and "Relationship with People". He was rated as inadequate in "Judgment". The comments made by Mr. Fritz, who prepared all of the above evaluations, noted that the Complainant had to be constantly reminded to keep radiation survey meters in calibration at six month intervals, that he had periods of unexplained absences of 1/2 to 1 hour in duration, that others frequently had to hand out packages and that he has made "unfounded public accusations, derogatory statements and letters pertaining to the Radiation Safety Office". Complainant took issue only with the last comment of Mr. Fritz, both in a letter to Dr. Saenger on February 11, 1982, (Compl. Ex. 15) and at the hearing. Since Complainant did not contest the other observations made by Mr. Fritz, it

is assumed that he acquiesced in their correctness. The Complainant relies heavily on this notation by Mr. Fritz evidencing an unlawful motive for the February 1983 suspension.

In the meantime, due to the safety concerns raised by the Complainant, the Respondent caused an investigation to be conducted by the State of Ohio under the direction of Robert M. Quillen, CHP, Radiological Health Program Director. (Resp. Ex. 23) The report to UC, dated November 17, 1981, states, in essence, that the "University of Cincinnati radiation protection program is adequate". It does not appear, however, that Complainant was given a copy of Mr. Quillen's report until on or about May 12, 1982. (Compl. Ex. 2) In any event, the complainant's allegations continued following his receipt of the Quillen report.

At the hearing, the parties were in agreement that the burdens of proof in this case should be in accord with the holding of the National Labor Relations Board (NLRB) in *Wright Line, Inc.*, 253 NLRB 1083 (1980). The *Wright Line* test has been held to be applicable in cases arising under the Energy

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Reorganization Act. *Consolidated Edison Company of New York, Inc., v. Donovan*, 673 F.2d 261 (2d Cir. 1982); *Ellis Fishel State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980). On June 15, 1983, the United States Supreme Court upheld the NLRB's *Wright Line* rule and definitively stated what the respective burdens on parties were in "dual" or "mixed motive" cases of alleged employee discrimination. *N.L.R.B. v. Transportation Management Corp.*, ___ U.S. ___, 51 U.S.L.W. 4761. Pursuant to the Court's holding, I find that the complainant must show that the Respondent's disapproval of his protected activities played a role in the decision to discipline him. If that burden of persuasion is carried, the burden would be on the Respondent to show, by a preponderance of the evidence, that it would have reached the same decision even if, hypothetically, it had not been motivated by a desire to punish the Complainant for engaging in his protected activities.

In the case *sub judice*, there is no question that Complainant's correspondence to the NRC was protected activity. Indeed, the Respondent admits that it was and concedes that it was aware of such activities. Based on the internal memoranda of Drs. Saenger, Troup and Jacobson, it is obvious that they believed, among other things that Complainant's safety allegations were unfounded. To conclude that they did not consider Complainant's contentions to the NRC would be to ignore reality and the facts. However, I decline to address the collateral issue of whether Complainant's allegations were motivated in good faith. While I believe that § 5851 of the Act contemplates some measure of "good faith" on the part of the complaining party, suffice it to say that in this case, the evidence does not demonstrate that Complainant was motivated solely by a sense of malice or vindictiveness toward the Respondent. That being so, I find that the Respondent's discipline of the Complainant was due at least in part to his having engaged in protected

activities *vis-a-vis* the NRC. The separate, highly interesting question of whether the Complainant's contentions of "common sense" safety violations, over and above the minimal standards which must be met by law, constitutes protected activity is not considered in this opinion given my ultimate conclusions.

Since the Complainant has shown by a preponderance of the evidence that his protected NRC activities played a role in the Respondent's decision to suspend him, the burden is now

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on the Respondent to demonstrate that the suspension would have occurred notwithstanding the Complainant's protected activities. As noted earlier, the Respondent contends that the Complainant was suspended due to his incompetency and inefficiency, reasons which the Complainant contends are pretextual. Thus, a review of the events leading up to the suspension is necessary.

On March 17, 1982, Mr. Fritz gave a memorandum to the Complainant stating, in substance, that he was to follow previously issued instructions to calibrate survey meters at six month intervals. (Resp. Ex. 24) It appears from the memorandum that nine month, had elapsed since the last calibration.

On March 29, 1982, Mr. Fritz issued a memorandum to Complainant outlining a new reporting procedure for the Complainant to follow with respect to notifying users of the readiness and availability of packages. (Compl. Ex. 4; Resp. Ex. 26) This directive was issued as a result of a request made to Mr. Fritz by pharmacist Craig Williams. (Resp. Ex. 25)

Subsequently, on October 6, 1982, the Complainant was issued an official reprimand by Mr. Fritz. (Resp. Ex. 30) The import of the reprimand was that Complainant continued to fail to follow instructions that he inform Mr. Fritz of package status and that he was insubordinate and verbally abusive of Mr. Fritz on October 4, 1982. Complainant was advised that additional appropriate action would follow if his infractions continued. Complainant responded to this reprimand (Compl. Ex. 26), admitting that he was abusive and stating that in the future he would provide Mr. Fritz with written package status.

Finally, on February 24, 1983, Complainant was given a 5 day suspension effective on February 28, 1983. (Compl. Ex. 1) The grounds stated were that on 16 occasions between October 1982 and February 1983 Complainant had failed to inform his supervisor of package status and that on February 4, 1983, he had delayed wipe-testing a 99m TC-generator and consequently delayed its delivery to the radioisotope lab, causing the patient schedule to be set back.

A pretext can be found to exist when "the purported rule or circumstances advanced by the employer did not exist,

or was not, in fact, relied upon [sic]". *Peavey Company v. N.L.R.B.*, 648 F.2d 460, at 462 (1981), quoting from *Wright Line*. In the instance case, it cannot be found that the principal reason for the discipline, *i.e.*, Complainant's failure to follow the reporting instructions of March 29, 1982, did not exist. The Complainant testified at the hearing that he disagreed with the directive and that he, using his own judgment, declined to follow it at times. In his appeal of the suspension to the State Personnel Board of Review, dated February 28, 1983 (Compl. Ex. 25), he stated, "I do not deny that I failed to comply with Mr. Fritz's interpretation of the memo."

I cannot find that the March 29, 1982, directive to the Complainant was unreasonable or that it made out a "very elaborate procedure" or that it was "complex, as characterized by the complainant in his testimony. Furthermore, I do not find that the Complainant could simply choose to ignore the directive because it was not described with particularity in his job description. The job description of May 12, 1982, (Compl. Ex. 3) was written in a broad fashion to cover the general duties he was to perform. The final item on that job description was "[u]pon request, carries out additional Radiation Safety Office duties". The directive being reasonable and there being no contention to the contrary by the Complainant during the period preceding the disciplinary action (except for some comments placed on his copy and then posted on the lab door, which, in my opinion, reflected complainant's disdain of authority in the form of his immediate supervisor), I find that it was within the ambit of his job description. As a subordinate employee, his supervisor could reasonably expect that the directive be followed.

The reason for the discipline clearly existed, the Respondent relied upon this reason for the discipline and the Complainant found himself in the dilemma of a suspension due to his admitted failure to follow instructions. Thus, I conclude that this reason was not pretextual.

The second reason advanced by the Respondent to justify the suspension, *i.e.*, the delay of February 4 by Complainant in wipe-testing the 99m TC-generator, is a more difficult consideration. This contention, in and of itself, simply does

not withstand scrutiny. Witnesses who testified in this regard did not, in my opinion, lend support to the allegation against the, Complainant. However, William Lodge, of the Respondent's personnel department, gave a most plausible explanation for the advancement of this reason. Since the Complainant is classified as a civil service employee under the laws of the State of Ohio, reasons for a disciplinary action are deemed waived before the Department of Administrative Services unless alleged in the employee notification. Mr. Lodge explained that when it was determined that the complainant should be disciplined for his failure to report package status to his

supervisor, Mr. Fritz was asked whether there were any other complaints regarding the Complainant which would be cause for discipline. The answer was the February 4, 1983, incident. I find, however, that the fact that this reason is not substantiated on this record does not necessarily make it *ipso facto* pretextual. At the time the disciplinary determination was made, a memorandum from Craig Williams existed documenting the incident. (Resp. Ex. 34) Thus, colorably, it was an additional deviation from the Complainant's assigned duties to be included as a basis for discipline. To the extent that it was relied on by the Respondent with a belief that an infraction had occurred does not, in the context of this consideration, render it pretextual.

Given the fact that the Complainant is entitled to a hearing before the state of Ohio on the merits of the discipline meted out, it remains to be seen whether either reason will be sufficient before that forum. My only concern here is whether the reasons were simply a pretext, with no basis in fact for the discipline, which would then permit a finding that the real reason could only have been the Complainant's protected activities.

Commencing in 1980, the Complainant began to chart a collision course with management. Aside from his safety campaign, which may yet lead to some violations being found against the Respondent, his other complaints were always characterized by personal assaults on the competency and integrity of his immediate supervisor, his fellow employees and the upper echelon of the university complex. There is no doubt in my mind that Complainant's incessant safety complaints to the media, the NRC and to any other number of people to whom the Complainant wrote were a consideration in

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the course of action followed with respect to the Complainant. I am also convinced, however, that any consideration in this regard by the Respondent was grounded in a sense of frustration and annoyance with the Complainant for what were perceived as meritless allegations, rather than out of any sense of fear that the university was going to be caught at breaking or circumventing the law.

These considerations notwithstanding, I am persuaded by a preponderance of the evidence in this case that even if the Complainant had never written to the NRC, had never cooperated with the NRC and had never made one statement alleging unsafe practices by the Respondent, he would nevertheless have been disciplined, given his continued verbal attacks on management and his admitted refusal to follow reasonable directives clearly within the scope of his assigned duties.

The Complainant points to contain procedural failings of the Respondent as indicia of an unlawful motive in effecting the suspension, namely, the Respondent's failure to counsel the complainant and failure to follow its system of progressive discipline. Only to the extent that these items are indications of possible unlawful activity do I consider them here; whether these alleged deficiencies will be found to have merit remains for consideration by the State of Ohio, based on Complainant's appeal. With regard to the

failure to counsel the Complainant, it became evident early on in the hearing that Complainant and his immediate supervisor simply did not communicate with one another. On October 6, 1982, when Mr. Fritz made a rare attempt to speak to the Complainant about what he should be doing, he was met with a verbal assault of obscenities. I am not prepared to find that because Mr. Fritz chose not to engage in a perceived act of futility, it should be found to be an indicia of an unlawful motive.

Turning to the issue of whether the Respondent conformed to its published progressive disciplinary system (Compl. Ex. 29), I find that there was substantial compliance with that system, insofar as it impacts on the considerations in this case. Mr. Lodge explained that while it might seem that a three day suspension should precede a five day suspension, this had always been a matter of discretion in its application, depending on the severity of the alleged offense. This explanation

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is reasonable and plausible, and I accept it.

Conclusion:

Based on the foregoing and the record as a whole, I find and conclude that although the Complainant's suspension was partly motivated by his protected activities, the Respondent has shown by a preponderance of evidence that notwithstanding such activities, the Complainant would have been disciplined in any event. Accordingly, I hereby make the following:

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED:

1. That the complaint be dismissed.
2. That following a final order to be issued by the Secretary of Labor (29 CFR § 24.6), any person adversely affected or aggrieved may obtain review thereof in the United States District Court of Appeals for the circuit in which the alleged violation occurred. (42 USC § 5851(a); 29 CFR § 24.7).
3. At the hearing, the parties waived the 90 day limit for consideration of this matter as prescribed by 29 CFR § 24.6(b). Additional time was incurred due to the initial investigation of the Complaint, delay in scheduling the hearing on a date agreeable to the parties and a delay in issuing this Recommended Decision and Order (by agreement of the parties to permit the undersigned to obtain and review the Supreme Court's decision in *Transportation Management Corp., supra.*) Accordingly, the overall period is enlarged by thirty (30) days.

DANIEL J. ROKETENETZ
Administrative Law Judge

[ENDNOTES]

¹ A special appearance was made by Stephen H. Lewis, Esq., Regional Counsel of the Nuclear Regulatory Commission, representing witness Donald Steniawski.

² In this Decision, "Admin. Ex." refers to administrative exhibits; "Compl. Ex." refers to Complainant's exhibits; and "Resp. Ex." refers to Respondent's exhibits.

³ I note that Dr. Saenger's April 15 memorandum to Dr. Wiot he states that he communicated with Complainant's immediate supervisor, Kenneth Fritz, Radiation Safety Officer, who described Complainant as an indifferent worker spending a great deal of time talking to people about irrelevant matters, that he had to be goaded to do assignments and that his productivity was low.